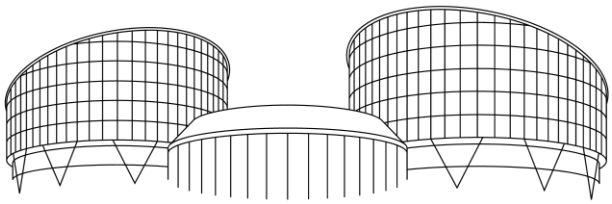

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF G.R. v. THE NETHERLANDS

(Application no. 22251/07)

JUDGMENT

STRASBOURG

10 January 2012

FINAL

10/04/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of G.R. v. the Netherlands**,**

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Corneliu Bîrsan,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Nona Tsotsoria,
Kristina Pardalos, *judges,*
and Marialena Tsirli, *Deputy Section Registrar,*

Having deliberated in private on 6 December 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 22251/07) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Afghan national, Mr G.R. ("the applicant"), on 23 May 2007. The President of the Chamber granted anonymity to the applicant of his own motion (Rule 47 § 3 of the Rules of Court).

2. The applicant was represented by Mr M. Mons, a lawyer practising in The Hague. The Netherlands Government ("the Government") were represented by their Deputy Agent, Ms L. Egmond of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that there had been a violation of his right to respect for his family life, as guaranteed by Article 8 of the Convention, in that he had unreasonably been refused an exemption from the obligation to pay an administrative charge to obtain a decision on his request for a residence permit. Of its own motion, the Court raised the question whether the applicant had been denied the effective remedy guaranteed by Article 13 of the Convention.

4. On 7 May 2009 the President of the Third Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (former Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961. He is married; he and his wife (born in 1968) have three children, born in 1992, 1993 and 1998 respectively. The family are resident in Zoetermeer.

6. On 8 December 1997 the applicant arrived in the Netherlands, five months after his wife and two children had arrived there. On 10 December 1997 the applicant applied for asylum. The Deputy Minister of Justice (*Staatssecretaris van Justitie*) rejected this application on 19 February 1999 but he did grant the applicant a conditional residence permit (*voorwaardelijke vergunning tot verblijf*), valid as of 10 December 1997, on the basis of a temporary "policy of protection for certain categories" (*categoriaal beschermingsbeleid*). The applicant's wife and children received residence permits for the purpose of asylum that same day. The applicant lodged an objection against the decision to refuse him asylum.

7. The situation in Afghanistan not having sufficiently improved, the applicant's conditional residence permit was *ex lege* converted into an indefinite residence permit after he had held it for a period of three years. Subsequently, with the entry into force of the Aliens Act 2000 (*Vreemdelingenwet 2000*) on 1 April 2001, the permit held by the applicant came to be named an indefinite residence permit for the purpose of asylum. In view of this development, the applicant's objection against the decision of 19 February 1999 was declared inadmissible on 16 July 2001.

8. On 28 May 2004 the Minister for Immigration and Integration (*Minister voor Vreemdelingenzaken en Integratie*, at that time the successor to the Deputy Minister of Justice) withdrew the applicant's residence permit (but not those of his wife and children) as Article 1F of the 1951 UN Convention relating to the Status of Refugees was held against him. The applicant filed an appeal against this decision which was rejected by the Regional Court (*rechtbank*) of The Hague on 29 March 2005. On 4 August 2005 the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*) confirmed the decision of the Regional Court at final instance.

9. The applicant's wife and children were granted Netherlands nationality on 13 December 2004.

10. On 21 October 2005 the applicant filed a new application for asylum, which was rejected by the Minister on 27 October 2005. The applicant's appeal was dismissed by the Regional Court of The Hague on 17 November 2005, and on 22 December 2005 the Administrative Jurisdiction Division of the Council of State dismissed the applicant's appeal at final instance.

11. Subsequently, on 9 January 2006, the applicant applied for a residence permit for the purpose of residing in the Netherlands with his wife. At the same time, he requested an exemption from the obligation to pay the statutory administrative charges (*leges*) of 830 euros (EUR). In this respect he invoked Decision 2005/46 amending the Aliens Act Implementation Guidelines 2000 (*Wijzigingsbesluit Vreemdelingencirculaire 2000*), according to which an alien who has a justifiable claim under Article 8 of the Convention in proceedings to obtain a residence permit for the purposes of family reunion (*gezinshereniging*) or family formation (*gezinsvorming*) could be exempted from paying the required charges if he or she complied with certain conditions. The applicant argued that he had a legitimate claim under Article 8 and that he had provided sufficient proof that he did not have the resources to pay the charges: since the withdrawal of his residence permit he himself was no longer eligible for social assistance and his family had to survive on social assistance intended for a single-parent family. There were no relatives or third persons prepared or able to pay the charges for him. He submitted a copy of his wife's social assistance pay slip for the month of December 2005 (stating a total payable amount of EUR 988.71), an official extract from the register of marriages dated 29 December 2005 showing him to be married to his wife, and an official document showing him, his wife and their children to be registered at the same address.

12. On 23 March 2006 the Minister decided not to process the application for a residence permit, as the applicant had failed to pay the required charge.

13. The applicant lodged an objection with the Minister against that decision, arguing that he had submitted a reasoned request to be exempted from the obligation to pay the administrative charge, which request the Minister had rejected without stating any grounds. On 31 March 2006 the applicant also applied for a provisional measure (*voorlopige voorziening*) to the Regional Court of The Hague in order to be allowed to await the outcome of his appeal in the Netherlands.

14. On 27 March 2007 the Regional Court rejected the request for a provisional measure and at the same time dismissed the objection. It considered that the applicant had failed to submit sufficient proof of his lack of resources to pay the required fees; it had therefore not been unreasonable for the Minister to decide not to process the applicant's request for a residence permit.

15. No appeal lay against the judgment of the Regional Court.

16. On 11 January 2008, in reply to questions put to them pursuant to Rule 49 § 3 (a) of the Rules of Court, the Government confirmed that, at the time the applicant lodged his request for a residence permit for the purpose of residing with his wife, the latter was in receipt of social assistance benefits for a single-parent family. They further confirmed that the applicant

was not in possession of a residence permit entitling him to acquire income by working in the Netherlands. He had nevertheless not qualified for the exemption from the obligation to pay administrative charges as he had submitted neither the required declaration of income and assets nor evidence relating to efforts made by his wife (being the residence permit holder with whom the applicant intended to stay) to obtain the necessary funds.

17. In reply to a further question, the Government submitted on 28 May 2008 that the assessment framework for an objection against the decision not to process an application for a residence permit due to a failure to pay the administrative charges was based on an *ex tunc* evaluation of whether that decision had been taken on reasonable grounds. Paying the administrative charges or submitting the required evidence subsequently was not an option; nor would it have any bearing on the decision not to process the application, as an *ex nunc* assessment was no longer possible.

18. On 21 July 2008, in response to a further question, the Government confirmed that the applicant could submit a new application for a residence permit, which would be processed once he had paid the administrative charges or obtained an exemption from the obligation to pay them. The examination of the merits of such an application would include an assessment of compliance with Article 8 of the Convention.

A. Relevant domestic law

1. Relevant immigration procedure

19. Section 4.1.2 of Chapter B1 of the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*), as applicable at the relevant time, stated that if an applicant for a residence permit claimed to be unable to pay administrative charges, that inability must be substantiated. The following documents should then be submitted with the application:

a. a statement of income and assets relating to the residence permit holder with whom the alien intended to stay;

b. evidence relating to efforts on the part of the alien and the residence permit holder over the previous three years to obtain funds;

c. documents establishing a plausible case for the fact that neither the alien nor the residence permit holder would be able in the short term to obtain the funds necessary to pay the administrative charges that were owed, and that obtaining the funds from a family member or third party was likewise impossible.

*2. The Work and Social Assistance Act (*Wet Werk en Bijstand)

20. Day-to-day implementation of the Work and Social Assistance Act, including the providing of social assistance and any verification, is the

responsibility of the Mayor and Aldermen (*burgemeester en wethouders*) of the municipality (section 7 (1)).

21. An entitlement to social assistance exists for every Netherlands national and every alien lawfully resident in the Netherlands if he or she has not the means to meet necessary living expenses (section 11(1) and (2)). A married couple in such a position are jointly entitled to such social assistance, unless one of the parties is not so entitled (section 11(4)); in the latter event, the other party is entitled to social assistance in the amount applicable to a single person living alone or a single-parent family as the case may be (section 24).

22. Persons in receipt of social assistance are obliged to make demonstrable efforts to obtain and take up generally accepted employment, and to co-operate with the Mayor and Aldermen in any attempts aimed at finding them such employment (section 9(1) and (2); see also *Schuitemaker v. the Netherlands* (dec.), no. 15906/08, 4 May 2010).

23. Persons seeking or receiving social assistance under this Act must inform the Mayor and Aldermen, on their own initiative or when so required, of all facts and circumstances that may reasonably be expected to influence *inter alia* their entitlement to social assistance; except in so far as such facts and circumstances can be established on the basis of certain authentic or official information (section 17(1)).

24. Social assistance paid in excess of entitlement may be recovered from the recipient (section 58(1)). In cases where another person is liable to support the recipient financially, the Mayor and Alderman may recover moneys paid by way of social assistance from that person (sections 60-62i).

25. Certain official and private institutions and persons are legally obliged to provide information to the Mayor and Aldermen when so required. These include, among others, the tax authorities; landlords; pension funds; chambers of commerce; health insurance providers; heads of police; suppliers of water and energy; and the registrars of the courts (section 64 (1) and (4)).

THE LAW

I. ADMISSIBILITY

26. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

27. The applicant complained of the financial threshold preventing him from seeking a residence permit for the purpose of residing with his wife and children. He relied on Article 8 of the Convention, which, in its relevant part, provides as follows:

> "1. Everyone has the right to respect for his ... family life...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government denied that there had been any violation of that provision.

A. Argument before the Court

28. In the view of the Government, the main issue was whether the applicant ought to have been exempted from paying administrative charges as a precondition for the processing of his request for a residence permit. It was not whether the applicant had wrongly been denied a residence permit, that being an issue which the immigration authorities had been prevented from considering.

29. Formal requirements as such were not, in their contention, contrary to the Convention. Domestic procedure could not function without time-limits and financial charges, regardless of the nature of the issue at stake. The only exception was, in their opinion, in case of "excessive formalism"; of which there had been none in the present case.

30. In fact, domestic procedure expressly provided for an exemption from the obligation to pay administrative charges if requiring the payment of such charges would be unreasonable in a particular case. Domestic law thus offered a measure of flexibility. All that was asked of a foreign national claiming peculiar hardship was documentary evidence.

31. The evidence proffered by the applicant, such as it was, had been insufficient. He ought to have submitted a declaration of income and assets verified by the municipality. This would have specified not only family income, but also regular expenditure and any assets which the applicant and his wife might have held. He ought in addition to have presented documentary evidence of some sort to show that he and his wife had tried to obtain the necessary funds, whether through work (which his wife, as a Netherlands national, could lawfully seek) or from friends and relations. It was not enough merely to state that social-security rules required proof of the applicant's wife's attempts to seek employment: social-security rules

and exemption from paying administrative charges were not related. This had been the position of the domestic authorities throughout the domestic proceedings, with which the competent tribunals had concurred.

32. Finally, the applicant remained free to submit a new request and either pay the administrative charge or submit the evidence required for an exemption to be granted.

33. The applicant submitted that the respondent had in fact practised excessive formalism. He submitted that the immigration authorities used the municipalities as their "front office" at the relevant time, and that it was also the municipality which was responsible for implementing the social-security legislation under which his wife enjoyed what income she had. The municipality had available to it a variety of means to check the financial situation of social-security recipients, including access to their bank details. A declaration of assets and means verified by the municipality would therefore have added nothing to what the municipality already knew.

34. Other than his wife's social-security benefits, the applicant had no source of funds. Family in the Netherlands he had none, nor anyone who would be prepared to advance him the money needed or indeed could be expected to.

B. The Court's decision

35. The Court finds it more appropriate to consider the case under Article 13 of the Convention.

III. WHETHER THERE HAS BEEN A VIOLATION OF ARTICLE 13 OF THE CONVENTION

36. The Court reiterates that it is master of the characterisation to be given in law to the facts of the case. It is not bound by the characterisation given by the applicant or the Government. By virtue of the *iura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the European Commission of Human Rights had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 41, Series A no. 24; *Powell and Rayner v. the United Kingdom*, 21 February 1990, § 29, Series A no. 172; *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I; and as a recent authority, *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 54, ECHR 2009-...).

37. Taking its own view of the facts of the case, the Court inferred from the application the complaint that the applicant did not have available to him an "effective remedy" appropriate to his complaint under Article 8 of the Convention. Of its own motion, the Court raised the question whether there had been a violation of Article 13 of the Convention.

38. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government denied that there had been any violation of that provision.

A. Argument before the Court

39. In the light of their position under Article 8 of the Convention, the Government argued that the applicant had no "arguable claim" such as to bring Article 13 into play.

40. In the alternative, they argued that the applicant had in fact had an effective legal remedy against the decision not to process his request; however, given his conduct, the domestic proceedings had never proceeded to a follow-up phase in which the legal remedies could have produced any useful effect. While the applicant had explored the procedural avenues open to him, he had failed to convince the domestic authorities, including the domestic courts, of his inability to pay the administrative charge.

41. In the further alternative, they argued that the essence of the complaint was whether the administrative charge constituted a bar on access to the proceedings to obtain a residence permit. In this sense, the problem before the Court was similar to that of the effect of court fees on access to court. While reminding the Court that court fees were an issue under Article 6 of the Convention, which did not apply to immigration proceedings (*Maaouia v. France* [GC], no. 39652/98, § 38, ECHR 2000-X), the Government expressed the view that the EUR 830 administrative charge was not excessive.

42. The applicant devoted no separate argument to this issue.

B. Merits

43. The Court takes the view that the essential question in the case is whether the applicant had effective access to the administrative procedure by which he might, subject to fulfilling the conditions prescribed by domestic law, obtain a residence permit which would allow him to reside lawfully with his family in the Netherlands.

44. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective". In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see, among many other authorities and *mutatis mutandis*, *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, §§ 288-290, 21 January 2011).

45. In the light of its decision set out in paragraph 26 above, the Court considers that for purposes of Article 13 the applicant had an "arguable" case under Article 8 of the Convention.

46. There is no doubt that the procedure for obtaining a residence permit was "effective in law" in that the applicant was fully entitled to make use of it and in that it was capable of yielding the result sought by the applicant, namely a right under domestic law for him to reside in the Netherlands with his family. The issue is whether it was "available in practice", given the financial threshold which the applicant states he found insuperable.

47. As the Government correctly state, the problem before the Court is similar to that of the effect of financial restrictions on access to court. That is a matter which the Court has had occasion to consider under Article 6 of the Convention (see, among other authorities, *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, §§ 61-67, Series A no. 316-B; *Kreuz v. Poland*, no. 28249/95, §§ 58-67, ECHR 2001-VI; *Weissman and Others v. Romania*, no. 63945/00, § 33-43, ECHR 2006-VII (extracts), as regards access to first-instance and appeal proceedings; *Apostol v. Georgia*, no. 40765/02, §§ 58-65, ECHR 2006-XIV as regards access to enforcement proceedings; and also, *mutatis mutandis*, *Anakomba Yula v. Belgium*, no. 45413/07, § 34-39, 10 March 2009, as regards denial of legal aid on discriminatory grounds).

48. As the Government – again, correctly – point out, Article 6 is not applicable to proceedings concerning the legality of an alien's residence, which pertain exclusively to public law (*Slivenko v. Latvia* (dec.) [GC], no. 48321/99, §§ 94-95, ECHR 2002-II (extracts)); moreover, the fact that such proceedings incidentally have major repercussions on the private and family life or on the prospects of employment of the person concerned cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (*Maaouia*, cited above, § 38).

49. It does not follow, however, that principles of "access to court" which the Court has developed under Article 6 § 1 of the Convention are irrelevant to Article 13. As the Court has pointed out many a time, the two Articles overlap, the former being a *lex specialis* of, and absorbing, the latter when the substantive right claimed is "civil" in nature or the case concerns the determination of a "criminal charge" (see, in particular, *Kudła v. Poland* [GC], no. 30210/96, § 146, ECHR 2000-XI).

50. Although in terms of procedural guarantees the requirements of Article 13 are less stringent than those of Article 6 (*Kudła*, *loc. cit.*), the very essence of a "remedy" as that expression is to be understood for the purposes of Article 13 is that it should involve an accessible procedure.

51. Turning to the facts of the case, the Court first notes that it is not concerned with administrative charges in the abstract, nor with the level at which the administrative charge in issue was set. Its sole concern is whether it prevented the applicant from seeking recognition of his arguable claim under Article 8 of the Convention.

52. The Court then observes that an exemption from having to pay the EUR 830 administrative charge was available to the applicant in law, subject to his satisfying the Minister for Immigration and Integration that he was actually unable to raise the money himself (paragraph 19 above).

53. In the event, the applicant submitted a copy of his wife's most recent social assistance pay slip, issued by the Mayor and Aldermen of the municipality of Zoetermeer from which it appeared that the monthly income of his family was EUR 988.71. The Minister for Immigration and Integration nonetheless turned down his request on the ground that he had failed to submit a declaration of income and assets, verified by that same municipality, along with proof of his and his wife's attempts to obtain funds from other sources. It is therefore apparent that, for lack of these documents, the Minister never considered whether the applicant's state of indigence was such as to qualify him for an exemption from the obligation to pay the administrative charge.

54. The Court understands that social assistance is not vouchsafed to anyone who has not satisfied the Mayor and Aldermen of his or her inability to meet necessary living expenses (section 11(1) and (2); see paragraph 21 above). The Mayor and Aldermen have wide powers of verification to ensure that social assistance is not paid in excess of entitlement (section 64 (1) and (4); see paragraph 25 above). Moreover, the obligation to undertake the necessary effort to earn one's own living is enshrined in the Work and Social Assistance Act also (section 9; see paragraph 22 above); and the Mayor and Aldermen themselves recover any maintenance due to the recipient of social assistance from private third parties as appropriate (sections 60-62i); see paragraph 24 above). The Court therefore fails to understand what the additional documents demanded by the Minister would have added to the social assistance pay slip.

55. In the circumstances of the present case, characterised as they are moreover by the disproportion between the administrative charge in issue and the actual income of the applicant's family, the Court therefore finds that the extremely formalistic attitude of the Minister – which, endorsed by the Regional Court, also deprived the applicant of access to the competent administrative tribunal – unjustifiably hindered the applicant's use of an otherwise effective domestic remedy. There has therefore been a violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

57. The applicant did not submit any claim in respect of pecuniary or non-pecuniary damage. He asked for the decision of 23 March 2006 to be revoked and for his request for a residence permit to be processed without his having to pay the administrative charge.

58. In addition, the applicant claimed various sums in respect of costs and expenses.

59. The Government informed the Court that they did not wish to comment on these claims but deferred to the Court's judgment.

60. As to the applicant's claim for the decision of 23 March 2006 to be revoked and his request re-processed free of charge, the Court reiterates that the respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. Consequently it considers that it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance (see, as a recent authority, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 181, 7 July 2011).

61. Rule 60 of the Rules of Court requires applicants to submit documentary evidence in support of their just-satisfaction claims. None at all has been submitted in the present case. The Court therefore dismisses the applicant's claims in respect of costs and expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;

3. *Holds* that there has been a violation of Article 13 of the Convention;

4. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli	Josep Casadevall
Deputy Registrar	President